

SIGUR ROS SDN BHD

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v.

MALAYAN BANKING BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR

B

NALLINI PATHMANATHAN J

[ORIGINATING SUMMONS NO: 24NCC-89-03-2013]

25 JUNE 2013

ARBITRATION: *Agreement - Construction - Arbitration clause - Whether effect of arbitration clause in one agreement incorporated into another agreement - Charter party and bank guarantee comprised two separate contractual documents - Whether bank guarantee subject to arbitration agreement contained in charter party*

C

CIVIL PROCEDURE: *Declaratory relief - Locus standi - Plaintiff sought declaration that defendant not entitled to call upon bank guarantee - Whether court entitled to look outside of s. 41 of Specific Relief Act 1950 in determining locus standi to initiate suit for declaratory relief - Whether plaintiff had interest in subject matter or would be 'peculiarly affected' - Whether existence of alternative remedies precluded claim for declaratory relief*

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CIVIL PROCEDURE: *Locus standi - Declaratory relief - Plaintiff sought declaration that defendant not entitled to call upon bank guarantee - Whether court entitled to look outside of s. 41 of Specific Relief Act 1950 in determining locus standi to initiate suit for declaratory relief - Whether plaintiff had interest in subject matter or would be 'peculiarly affected'*

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CONTRACT: *Construction - Agreement - Clauses in agreement - Whether effect of arbitration clause in one agreement incorporated into another agreement - Charter party and bank guarantee comprised two separate contractual documents - Whether bank guarantee subject to arbitration agreement contained in charter party - Whether clear and specific words to that effect*

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CONTRACT: *Guarantee - Bank guarantee - Expiry - Bank guarantee given to cover expenses to reinstate vessel - Bank guarantee expired before demand for payment made - Whether call for payment could be made after expiry of bank guarantee*

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- A The plaintiff and the second defendant ('D2') entered into a charterparty agreement for the charter of a vessel owned by D2 ('the vessel'). The agreement was in the form and style known as the BIMCO Time Charter Party For Offshore Service Vessels Code Name: Supplytime 2005 ('the contract'). The period of hire was 30 days; from 23 October 2012 to 21 November 2012.
- B Pursuant to cl. 43 of the contract, the plaintiff provided D2 with a bank guarantee ('BG') issued by the first defendant ('the bank') in favour of D2. The hire of the vessel was later extended until 26 January 2013. However, the vessel was only re-delivered to the plaintiff on 7 March 2013. Upon re-delivery, D2 alleged that in addition to damage to equipment, there was structural alteration and modification done by the plaintiff to the vessel. D2 demanded that the plaintiff reinstate the vessel to its original condition under cl. 4 of the contract. Given the effects of cls. 49 and 4, D2 maintained that as the vessel had not been reinstated, the contract had not expired, and hire continued. D2 then gave notice that if the plaintiff did the repair works, D2 would undertake the repair works itself. D2 also put the plaintiff on notice that it intended to liquidate the BG to cover the expenses to reinstate the vessel. The issues pertaining the damage to the Stinger Hatch and reinstatement of the vessel amounted, under the contract, to a dispute that was to be referred to arbitration. D2 called on the BG on 21 March 2013. The plaintiff contended that the BG expired on 21 December 2012 and accordingly the last day for D2 to make its demand on the BG was within 14 days of 21 December 2012, *ie*, until 4 January 2013. The plaintiff thus filed this suit seeking declarations, *inter alia*, that the BG had expired and that D2 was not entitled to call on the BG. D2 contended that the prayers sought by the plaintiff were to be more properly dealt with by an arbitrator in view of the terms of the contract, which contained a mandatory arbitration clause. D2 claimed that the agreement to arbitrate in the contract had been effectively incorporated into the terms of the BG by way of specific reference. D2 thus applied to stay proceedings pending arbitration on the grounds that the court had no jurisdiction to deal with the claims. Counsel for D2 also raised the issue of the locus of the plaintiff to seek the relief it claimed pursuant to s. 41 of the Specific Relief Act 1950 ("the Act") (in conjunction with O. 15 r. 16 of the Rules of Court 2012 ("O. 15 r. 6")). D2 contended that the plaintiff had no *locus standi* to bring the current suit because the plaintiff was neither a party to the BG nor had any legal entitlement under the BG since the BG was between the bank and D2.
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Held:

- (1) The BG and the contract comprised two separate contractual documents. The BG was between the bank and D2 while the contract was between the plaintiff and D2. The BG was not the subject matter of the arbitration agreement as contained in the contract. In order to incorporate the effect of an arbitration clause in one agreement into another agreement, there must be very clear and specific words to that effect. In short, the third party must be seen to have expressly agreed to arbitrate. A distinction is made between single party and two party contractors. A much stricter test is applicable for two party contracts as was the case here. (para 68)
- (2) The dispute relating to the validity of the BG need not be stayed pending the determination of the dispute between the plaintiff and D2 at arbitration. Accordingly, D2's application seeking a stay of these proceedings pending arbitration was dismissed. (para 71)
- (3) Section 41 of the Act is not exhaustive in relation to the grant of declarations. Whether it be under O. 15 r. 16 or the inherent jurisdiction of the court, the court was entitled to look outside of s. 41 of the Act in determining whether or not the plaintiff had *locus standi* to initiate the suit in relation to the validity of the BG. The test was whether the plaintiff had an interest in the subject matter of the dispute or whether the plaintiff's interests would be 'peculiarly affected' by the call on the BG. (para 91)
- (4) The plaintiff's interests would be directly affected by honouring of the BG because it was the plaintiff's funds that would be utilised to honour the BG. The plaintiff thus had a valid and legitimate interest in the dispute pertaining to the validity of the BG. The fact that the plaintiff had no direct cause of action in respect of the BG did not preclude the plaintiff from seeking the declaratory relief because its interests were peculiarly affected. The fact that the plaintiff had the option of proceeding against the bank for wrongful honour of the BG did not preclude the plaintiff from initiating the suit for declaratory relief. The existence of alternative remedies does not obviate or preclude the bringing of the suit. (para 92)

- A (5) The BG had expired as of 21 March 2013, when D2 made a demand under it and as such D2 was not entitled to call on the BG. (para 110)

Case(s) referred to:

- B *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* [1995] 1 CLJ 283 SC (**refd**)
Federal Bulk Carriers Inc v. C Itoh & Co Ltd and Others [1989] 1 Lloyd's Rep 103 (**refd**)
Focal Asia Sdn Bhd & Anor v. Raja Noraini Raja Datuk Nong Chik & Anor [2009] 1 LNS 913 HC (**refd**)
- C *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL* [2010] EWHC 29 (Comm); [2010] 1 All ER 1143 (**refd**)
Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors & Other Cases [1983] 2 CLJ 68; [1983] CLJ (Rep) 165 FC (**refd**)
Lanna Resources Public Co Ltd v. Tan Beng Phiau Dick and Another [2011] 1 SLR 543 (**refd**)
- D *Master Marine AS v. Labroy Offshore Ltd* [2012] 3 SLR 125 (**not foll**)
Skips Nordheim v. Syrian Petroleum Co Ltd [1984] 1 QB 599 (**refd**)
Standard Chartered Bank Malaysia Bhd v. City Properties Sdn Bhd & Anor [2008] 1 CLJ 496 HC (**refd**)
Sumatec Engineering and Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd [2012] 3 CLJ 401 FC (**refd**)
- E *Tan Sri Hj Othman Saat v. Mohamed Ismail* [1982] 1 LNS 2 FC (**refd**)
The Attorney General of Hong Kong v. Zaayah Wan Chik & Ors & Another Appeal [1995] 3 CLJ 35 CA (**refd**)
TW Thomas & Co Limited v. Portsea Steamship Company Limited [1912] AC 1 (**refd**)
- F *YAB Dato' Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener)* [2009] 4 CLJ 253 FC (**refd**)

Legislation referred to:

- G Arbitration Act 2005, ss. 9(1), (2), (3), 10, 11
Rules of Court 2012, O. 15 r. 16
Specific Relief Act 1950, s. 41

Evidence Act 1872 [Ind], s. 41
Specific Relief Act 1963 [Ind], s. 34
- H For the plaintiff - Chang Chew Min (Chan Kheng Hee with him); M/s Kheng Hoe & Partners
For the 1st defendant - Kevin Rozario; M/s Khairuddin Ngiam & Tan
For the 2nd defendant - Gan Khong Aik (Lim Bee San with him); M/s Gan & Partnership
- I Reported by Amutha Suppayah

JUDGMENT

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Nallini Pathmanathan J:

[1] The plaintiff in this originating summons, Sigur Ros Sdn Bhd ('the plaintiff') seeks declarations *inter alia*, that:

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(a) The plaintiff's Bank Guarantee No. 99060BGF5921220 dated 30 October 2013 ('BG') issued by the first defendant, Malayan Banking Bhd ('the bank') to the second defendant, Master Mulia Sdn Bhd ('D2') has expired; and

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(b) D2 is not entitled to call on the said BG issued by the bank.

[2] D2 however opposes this originating summons on the grounds that the issues that arise above in (a) and (b) in relation to the BG are more properly dealt with by an arbitrator in view of the terms of a charterparty agreement between the plaintiff and itself, which contains a mandatory arbitration clause. D2 maintains that the agreement to arbitrate in the charterparty agreement has been effectively incorporated into the terms of the BG by way of specific reference, and that accordingly, the reliefs sought by the plaintiff are more properly dealt with by way of arbitration.

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[3] D2 effectively maintains that this court has no jurisdiction to deal with the issues set out in (a) and (b) above in light of the said arbitration clause which, it is contended, is effectively incorporated into the BG and therefore binding on D1 as well as the plaintiff and D2.

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[4] To this end therefore D2 has filed an application in encl. 6 for a stay of proceedings pending arbitration under s. 10 of the Arbitration Act 2005.

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[5] Given the foregoing, it is necessary to determine encl. 6 relating to the stay of proceedings pending arbitration first, as this will effectively determine whether the plaintiff is entitled to have these declarations made by this court or by an arbitrator. If D2 succeeds in its application for a stay, there will be no further need to consider the questions posed and declarations sought by the plaintiff as these matters will be dealt with by the arbitrator in the course of the resolution of the dispute under the charterparty agreement. If however, D2 fails in its application for a stay of proceedings, it will then be necessary to go on to consider

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- A whether the plaintiff is in fact entitled to the reliefs sought herein. The matters here are purely questions of law and therefore efficaciously determined by way of an originating summons.

Salient Facts

- B [6] The salient facts have been comprehensively set out in the affidavits relating to this matter as well as the written submissions of learned counsel for the plaintiff, Mr Chang Chew Min, and D2, Mr Gan Khong Aik. I adopt the chronology below from the affidavits and their submissions.
- C [7] On 23 October 2012 the plaintiff and D2 entered into a charterparty agreement for the charter of a vessel owned by D2, namely the 'PLB Mas Mulia' ('the vessel'). The agreement was in the form and style known as the BIMCO Time Charter Party For Offshore Service Vessels Code Name: Supplytime 2005 ('the contract').
- D [8] The salient terms of the contract include the following matters:
- E (a) The hire period
- (i) Box 9 of the contract provides that the period of hire is 30 days from 23 October 2012 to 21 November 2012.
- F (ii) Box 9 of the contract also provides an option to extend the period of hire for another 30 days.
- (iii) Box 10 of the contract allows the plaintiff and owner to mutually agree on a period to extend the hire period. However 10(ii) requires that an option to extend the period of hire must be declared with an advance notice of 14 days.
- G (iv) The mutual agreement to extend the hire period is subject to cl. 1(b) of the contract.
- H (v) Box 11 of the contract limits the maximum extension period to 60 days. It is subject to cl. 1(c) which stipulates as follows:
- I The Charter Period shall automatically be extended for the time required to complete the voyage or well (whichever is stated in Box 11(i)) in progress, such time not to exceed the period stated in Box 11(ii).

(vi) Box 11(ii) specifies that the maximum extension period is 60 days, which allows for an extension until 21 December 2012. A

(b) Provision of BG

(i) Clause 43 of the contract: B

Charterers (i.e. Plaintiff) shall provide to Owners (ie, D2) an irrevocable, unconditional and on demand Bank guarantee (BG) from a Malaysian bank in the format acceptable to Owners for the amount of RM3,888 Million within 7 working days from the time the Vessel is delivered to the Charterers as stated in Box. *This BG shall be valid until 1 day upon expiry of the charter duration and/or delivery of Vessel at the port of redelivery.* In the event the Charter is extended or is expected to extend beyond the extended 30 days extension option, Charterers shall adjust the value of the BG and extend the BG's validity to cover the intended extension period. Should Charterers fail to provide the BG, adjust its value or extend the validity of the BG, Owners reserve the full right to demobilise the Vessel, its spread and crew and charge all the costs incurred to Charterers, as well as and in addition to, in the case of late extension of the BG, to draw on the BG. (emphasis added). C

(ii) The other pertinent clause is cl. 34(c) of the contract: D

This Charter party shall be governed by and construed in accordance with the laws of the place mutually agreed by the parties and any dispute arising out of or in connection with this charter party shall be referred to arbitration at a mutually agreed place, subject to the procedures applicable there. ('Arbitration Clause') E

(c) The BG F

Pursuant therefore to cl. 43 of the contract, the plaintiff provided D2 with the BG. The BG was issued by the bank on the instruction of the plaintiff in favour of D2 in the sum of RM3,719,115. G

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- A (i) The salient provisions of the BG in turn provide as follows:
- 1.
- ...
- B 2. In response to the request made by Owner, we Malayan Banking Berhad (address) ... hereby irrevocably and unconditionally guarantee the sum RM3,719,115-00 in favour of Owner being the amount of financial guarantee required for the above CPA. If on the occurrence of any
- C of the followings and on receipt of the Owner first written demand and if within 14 calendar days, Charterer fails to resolve them we shall forthwith pay to the Owner the amount specified in such demands notwithstanding any contestation or protest by the Charterer or by any other third party;
- D a. Non-payment as per Clause 42 of the CPA.
- b. The Vessel is being withheld/detained by the Indonesian Authorities for reason due to Charterer's negligence.
- E 3.
- ...
- F 4. This guarantee is continuing security and accordingly shall remain in force **until fourteen (14) calendar days after the expiry of the CPA and mentioned in Box 9 of the CPA**. If within this fourteen days, we have not received any demand from you, this Guarantee shall be lapse and cease to have any effect whatsoever and we shall be deemed to be discharged and released from all
- G and any liability under this guarantee without prejudice. (emphasis added).

The Period Of Hire As Set Out In The BG

- H [9] Clause 4 of the BG specifically refers to Box 9 of the contract which provides for a period of hire of 60 days. (It will be recalled that Box 11(ii) and cl. 1(c) of the contract allow for a maximum hire period of 60 days). This 60 days comprises:
- I (i) An initial period of 30 days from 23 October 2012 to 21 November 2012; and
- (ii) An extension period of 30 days from 21 November 2012, ending on 21 December 2012.

[10] The correspondence between the plaintiff and D2 discloses the following: A

(i) The plaintiff wrote to D2 on 27 November 2012 giving notice of the exercise of a 30 day extension;

(ii) The plaintiff wrote to D2 on 27 December 2012 giving notice to the owner of another extension from 28 December 2012 to 26 January 2013; B

(iii) D2 *vide* letter of 27 December 2012 wrote to the plaintiff confirming the 'agreement between the owner and charterer' on the extension of the vessel for 30 days from 28 December 2012 to 26 January 2013; and C

(iv) E-mail correspondence between the plaintiff and D2 between 28 November 2012 and 19 February 2012. Upon the expiry of the extension on 26 January 2013, D2 sent an email on 5 February 2013 and proposed to proceed with a further 30 days firm charter for the fourth month with an extension option. D2 sought confirmation of this proposal. The plaintiff did not confirm acceptance because it was demobilising the vessel on 14 February 2013. It advised D2 on 14 February 2013 of this demobilisation which took place on the same day. D E

[11] Thereafter the vessel was only redelivered to the plaintiff on 7 March 2013. F

D2's Complaints And Claim Under The BG

[12] Upon redelivery, an off-hire survey was conducted by D2. D2 alleged that in addition to damage to equipment, there was structural alteration and modification done by the plaintiff at the vessel's stinger hitch area which required the vessel to be dry-docked to enable remedial works to be carried out. The stinger hitch is a piece of apparatus that is attached to the vessel. G

[13] According to the plaintiff it was damaged on 9 January 2013 due to bad weather during pipe laying operations. D2 alleges that the damage to the stinger hitch is due to the plaintiff's operation of the vessel while the plaintiff maintains that the damage is due to a pre-existing condition. In addition to the damage to the sting hatcher, D2 also alleged that other equipment had been damaged, which required reinstatement. H I

- A [14] On 8 March 2013, D2 made a demand to the plaintiff to reinstate the vessel to its original condition under cl. 4 of the contract. Clause 4 of the contract provides for the charterers, ie, the plaintiffs, having the option, at their expense, of making structural alterations to the vessel with D2's consent. However, it
- B is required that the vessel, when redelivered, is in her original condition. The vessel is deemed to remain on hire during any period of alteration or reinstatement.
- C [15] In this context cl. 49 of the contract is relied upon by the defendant. Clause 49 of the contract provides that '... the daily charges of USD45,000 per day shall cease upon completion of the off-hire survey on the barge arrival at designated anchorage and/or at any point of anchorage to be mutually agreed by both parties.'
- D [16] Given the effects of both cls. 49 and 4, D2 maintains that as the vessel has not been reinstated, the contract has not expired, and hire continues.
- E [17] Further the earliest time at which the hiring of the vessel ceased was upon redelivery at the port of redelivery and completion of the off-hire survey.
- F [18] In its letter of 8 March 2013, D2 also requested for a meeting to discuss the reinstatement of the vessel. There was no immediate response from the plaintiff.
- G [19] On 12 March 2013, ie, four days later, D2 followed up with a letter, giving notice that if the plaintiff did not submit its proposal for reinstatement and repair of the vessel within two days, D2 would undertake the repair works itself.
- H [20] Significantly, for the purposes of this application, D2 put the plaintiff on notice that it intended to liquidate the BG to cover the expenses to reinstate and repair the vessel. Both the letters of 8 March and 12 March were copied to D1, the bank.
- I [21] The plaintiff also received D2's letter to the bank maintaining that the vessel remained on hire and putting the bank on notice that the BG would remain valid and in force until the cessation of hire.

Dispute To Be Referred To Arbitration

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[22] The issue of the damage to the stinger hatch and as well as the other issues pertaining to a claim for reinstatement by D2 amount, under the contract, to a dispute that is to be referred to arbitration.

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D2's Call On The BG Dated 21 March 2013

[23] D2 then exercised its right to call on the BG on 21 March 2013. It maintains that even if it is accepted that the contract expired on 7 March 2013, it is still within time in so exercising its rights.

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[24] The plaintiff maintains that the BG has expired and therefore the call is ineffectual. The bank, although initially silent, subsequently wrote to D2 maintaining, as did the plaintiff that the BG had expired. Accordingly the bank could not honour the same.

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The Originating Summons And Declarations Sought By The Plaintiff

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[25] The plaintiff's contention in this originating summons essentially is that pending reference of the dispute to arbitration, which the plaintiff is ready and willing to do, D2 is not entitled to make any demand on the BG as it has expired. To that end it seeks declarations to this effect.

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[26] In this context, the plaintiff contends that upon a reading of Box 9, Box 11(ii) and cl. 1(c) of the contract, as well as cl. 4 of the BG, the BG expired on 21 December 2012. Accordingly it is the plaintiff's submission that the last day for D2 to make its demand on the BG was within 14 days of 21 December 2012, ie, until 4 January 2013. There was no demand issued by this date. On this basis it is contended that the BG has expired.

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[27] The plaintiff's submission is that the hire of the vessel indeed continued, but after the expiry of the BG. Such hire continued as borne out by the correspondence evidencing the extensions shown above until the demobilisation of the vessel on 14 February 2013.

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[28] The defendant on the other hand maintains that the BG remains effectual and valid and binding given that the term of hire under the contract continues until reinstatement, or at the earliest,

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- A upon redelivery of the vessel on 7 March 2013. As such it maintains that its demand issued on 12 March 2013 was within the requisite 14 day period specified under the BG. The defendant also contends that given the dispute as to the term of the hire period, and the date of expiry of the BG, it is not possible to conclude with any degree of certainty that the BG has in fact expired.

- C [29] The parties' dispute centres around the date of expiry of the contract. In this context D2 relies on cl. 49 of the contract which provides that '... the daily charges of USD45,000 per day shall cease upon completion of the off-hire survey on the barge arrival at designated anchorage and/or at any point of anchorage to be mutually agreed by both parties.'

- D [30] The plaintiff however maintains otherwise. The plaintiff maintains that the contract expired on 21 December 2012 and hence the demand made on the guarantee was out of time. The plaintiff maintains that the BG has to be strictly interpreted in accordance with its terms.

- E [31] The crux of the matter therefore is whether the demand made by D2 was within the 14 days duration as envisaged under the BG.

- F [32] D2 maintains that this issue can only be determined after the issue on the duration of the contract has been determined. And the issue of the duration of the contract, which is determined in turn by the date of expiry of the contract, can only be ascertained when the dispute on the interpretation of cls. 4, 49 and 43 of the contract are determined by the arbitrators in accordance with the arbitration clause. D2 therefore contends that this matter amounts to a dispute arising out of the contract, ie, the charterparty agreement. As such, D2 seeks a stay pending arbitration under s. 10 of the Arbitration Act 2005. Section 10 provides as follows:

- H (1) A court before which proceedings are brought in respect of a matter which is the subject of an Arbitration Agreement shall where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the Agreement is null and void, inoperative or incapable of being performed.
- I (2) The court, in granting a stay of proceedings, pursuant to subsection (1) may impose any conditions as it deems fit.

[33] The plaintiff however maintains that the BG has to be read in isolation or *in vacuo* as it were, as there is a clear distinction between the BG and the underlying contract, ie, the charterparty agreement, in respect of which the BG was furnished as security. As there are two independent contracts involving different parties, the plaintiff maintains that the BG should be construed in isolation and is not subject to the arbitration clause, notwithstanding the reference to Box 9 in the BG. This in itself, it is contended is insufficient to incorporate the dispute resolution clause or the arbitration clause into the BG. D2 on the other hand maintains that this is precisely the effect of Box 9 etc, as a result of which the BG cannot be construed in isolation and must be considered in the context of the contract. As such it becomes a dispute 'arising out of or in connection with' the contract and is thereby subject to the arbitration agreement. As such its validity of the BG cannot be determined without the period of hire being determined by an arbitrator in the course of arbitration.

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[34] The plaintiff disputes D2's contention that the issue of the validity of the BG is a dispute 'arising out of or in connection with' the primary charterparty agreement, ie, the contract.

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[35] It follows from the foregoing sequence of events and filings in court that the first issue for consideration by this court is whether the dispute ought to be stayed pending arbitration under s. 10 of the Arbitration Act 2005 as contended by D2 in encl. 6. If the answer is in the negative then the issue of whether the plaintiff is entitled to the relief sought can then be considered. If however the answer is that this is a matter which arises out of or in connection with the contract, then the matter ends there and a stay pending arbitration ought to be granted.

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Issue 1: Does The Reference To 'Box 9 Of The CPA' In The BG (Between The Bank And D2) Have The Effect Of Subjecting It, ie, The BG, To The Arbitration Clause In The Contract (Between The Plaintiff And D2)?

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[36] For convenience cl. 4 of the BG provides as follows:

This guarantee is continuing security and accordingly shall remain in force until fourteen (14) calendar days after the expiry of the CPA mentioned in Box 9 of the CPA. If within this fourteen (14) days, we have not received any demand from you, this Guarantee shall be lapse and cease to have any effect whatsoever and we shall be deemed to be discharged and released from all and any liability under this guarantee without prejudice.

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A [37] The plaintiff submits that the law makes a clear distinction between the BG and the underlying contract for which the BG is furnished as security. In *Sumatec Engineering and Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd* [2012] 3 CLJ 401; [2012] 4 MLJ 1, Abdull Hamid Embong FCJ stated as follows:

B ... (iii) A distinction must be drawn between an injunction to restrain a bank/issuer from making payment out on a performance bond (which is governed by the performance guarantee agreement) and an injunction to restrain the beneficiary from making a demand on the bond (which is governed by the underlying contract between the parties.

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[38] The BG and the contract are autonomous documents and it is an established principle of law that they must be kept separate. In *Focal Asia Sdn Bhd & Anor v. Raja Noraini Raja Datuk Nong Chik & Anor* [2009] 1 LNS 913; [2009] MLJU 1688

D Mohamad Ariff JC (now JCA) held as follows:

... The *locus classicus* on international trade law, *Schmittholff's Export Trade: The Law and Practice of International Trade* (11th ed., 2007) includes a relevant commentary on this point:

E ... Many considerations which apply to documentary credits likewise apply to the bank guarantee. In particular the principles of the autonomy of the bank's undertaking and the strict compliance with the conditions stated in the bank's instructions apply *mutatis mutandis* to bank guarantees as well.

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[39] His Lordship concluded:

G A demand guarantee or performance bond which is unconditional has first and foremost to be treated as subject to the well-established principle of autonomy of the document which must be kept separate from the underlying contract.

H [40] The issue that falls for consideration therefore is whether the issue of the validity of the BG is subject to an arbitration agreement by virtue of the inclusion, in the BG, of the reference to Box 9. As such, can a stay of the originating summons seeking declarations as to the validity of the BG be stayed pending arbitration of the dispute between the plaintiff and D2?

I [41] Section 10 provides that where a matter is the subject of an arbitration agreement, the court shall stay the proceedings and refer the matter to arbitration provided the party making the application has not taken any steps in the proceedings.

[42] It follows from the foregoing that it is only if the matter is the subject of an arbitration agreement that the matter may be stayed. As to what comprises an arbitration agreement is set out in s. 9(1), (2) and (3) of the AA 2005:

9(1) In this Act, ‘arbitration agreement’ means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

[43] It is not in issue that there is no reference to an arbitration agreement or arbitration clause in the BG. Neither does the BG expressly incorporate the arbitration clause of the contract into the BG. The only reference in the BG to the contract is in cl. 2, which refers to cl. 42 of the contract and cl. 4 which refers to Box 9. Neither cl. 42 nor Box 9 are arbitration clauses. Box 9 states merely that the initial period of hire for ‘firm charter duration of 30 days’ and with ‘30 days extension option’.

[44] A case on point is that of *Lanna Resources Public Co Ltd v. Tan Beng Phiau Dick and Another* [2011] 1 SLR 543. In this decision of the Singapore High Court, the facts were that the plaintiff was a company incorporated in Thailand. The defendants were directors of a company incorporated in Singapore (‘Singapore company’). A Memorandum of agreement was entered into between the plaintiff, the Singapore company and a third company. Pursuant to such agreement, the plaintiff provided a loan to the Singapore company. This loan was separately guaranteed by the defendants as principal debtors (‘the guarantee’). The Singapore company defaulted on the loan whereupon the plaintiff sought to enforce the guarantee against the defendants through court proceedings in Singapore. The plaintiff also submitted its claim against the Singapore company for arbitration pursuant to an arbitration clause in the memorandum of agreement. The defendants then applied for a stay of proceedings claiming *inter alia* that there was a purported agreement to arbitrate.

- A [45] Judith Prakash J dismissed this contention outright holding as follows:
- ... The guarantee does not contain an arbitration clause ...
- B ... The guarantee is a contract which is separate and independent from the MOA and must be construed in accordance with its own terms and not in accordance with the terms of the MOA. There is nothing in the guarantee which expressly or even impliedly incorporates the arbitration clause in the MOA ...
- C [46] In like manner in the instant case there is nothing in the BG which expressly or impliedly incorporates the arbitration clause in the MOA into the BG.
- [47] Learned counsel for the plaintiff, Mr Chang Chew Min, undertook an extensive and comprehensive study of the case-law on this subject, for which this court is grateful. Having done so, he submitted that the cases from 1912 to 2010 in the United Kingdom consistently show that clear and specific words must be used and found in the body of a document to be effective to incorporate an arbitration clause from another contract or document between different parties.
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- [48] In *TW Thomas & Co Limited v. Portsea Steamship Company Limited* [1912] AC 1 the charterparty between the owners (respondents) of the steamship and charterers provided for disputes to be arbitrated.
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- [49] The bill of lading had a clause which provided that ‘... all other terms and conditions and exceptions of charter to be as per charterparty including negligence clause.’
- G [50] The owners of the steamship sued the appellants as holders of the bill of lading for demurrage and the appellants applied to stay all proceedings under the Arbitration Act 1889. The House of Lords held as follows:
- H (i) the arbitration clause in the charterparty did not govern shipment or carriage or delivery or the terms upon which delivery is made;
- I (ii) the arbitration clause only governed disputes between the parties to the charterparty and disputes arising under it and not disputes arising out of the bill of lading;

- (iii) the arbitration clause in the charterparty is not germane to the receipt, carriage or delivery of cargo or freight payment which is the proper subject matter for the bill of lading; and A
- (iv) explicit, distinct and specific words must be used to incorporate the arbitration clause. General words do not suffice. B

[51] Lord Robson held as follows:

Both clauses are subject to the rule that the terms of the charter party when incorporated or written into the bill of lading shall not be insensible or inapplicable to the document in which they are inserted, and it is not absolutely clear that, when thus tested, this arbitration clause is applicable to a dispute between persons other than the parties to the charter. C

In one sense it is perhaps difficult to imagine any dispute relating to the chartered voyage which might not be said to arise out of the conditions of the charter, but we are here dealing with obligations founded primarily on the bill of lading, which is a different contract and is made between different parties though it relates in part to the same subject matter as the charter. The limitation of the clause to the conditions of "this charter party" is therefore, to say the least, embarrassing and ambiguous when it comes to be written into the bill of lading. It requires, indeed some modification to make it read even intelligibly in its new connection. D E

[52] It follows from the foregoing that it is not possible to simply import an arbitration clause in one contract to another contract between different parties although it relates in part to the same subject matter. The purpose of the BG as set out above is to guarantee the plaintiff's payment obligations under cl. 42 of the contract and the vessel's detention due to the plaintiff's negligence. The contract relates to the charter of the vessel for pipeline installation works and contains many more clauses which are not relevant to the BG. F G

[53] In *Skips Nordheim v. Syrian Petroleum Co Ltd* [1984] 1 QB 599 (*'Varennia'*) the issue was whether the arbitration clause in the charterparty agreement was incorporated into the bill of lading to disputes between the owner and consignee. The charterparty provided that "... all bills of lading issued pursuant to this charter shall incorporate by reference all terms and conditions of this charter including the arbitration clause ...". H I

- A [54] The bill of lading provided that "... all conditions and exceptions of the charterparty including the negligence clause are deemed to be incorporated in bill of lading."
- [55] The English Court of Appeal held that:
- B (a) The words of the bill of lading were limited to conditions applicable to the carriage and delivery of goods; and
- (b) More specific words are required to include the arbitration clause.
- C [56] Similarly in *Federal Bulk Carriers Inc v. C Itoh & Co Ltd and Others* [1989] 1 Lloyd's Rep 103 the bill of lading provided that:
- all terms and conditions and exceptions as per charter party dated January 20 1986 and any addenda thereto to be considered as
- D fully incorporated herein as if fully written.
- [57] Bingham LJ held that the arbitration clause in the charterparty was not incorporated into the bill of lading:
- E ... But an express statement to this effect does not, in my judgment assist in determining what is incorporated and what is not (at page 106)
- [58] Dillon LJ held that the words used in the bill of lading "is quintessentially a formula which is not effective to incorporate into the bill of lading an arbitration clause contained in a charterparty"
- F (see p. 110).
- [59] Bingham LJ went a step further and considered whether the arbitration clause could be incorporated in the bill of lading
- G from the terms of the charterparty itself which provided that it was mutually agreed that "this contract shall be completed and superseded by the signing of bills of lading in the form customary for such voyages ... which bills of lading shall contain the following clauses" one of which was the arbitration clause. His Lordship
- H concluded that the arbitration clause was not so incorporated because the bill of lading contained some of the charterparty terms but not the others. Secondly the parties to the bill of lading are not the same parties to the charterparty.
- I [60] In *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL* [2010] EWHC 29 (Comm); [2010] 1 All ER 1143 the dispute centred on the use of the words "All the rest will be the same as our previous contracts". There had been 14 previous

contracts between Habas and Sometal between January 2004 and January 2006. Some of the previous contracts contained clauses providing for London arbitration, some for Istanbul arbitration and the rest were silent on the mode and/or form of dispute resolution. A dispute arose and Sometal commenced London arbitration. Habas challenged the jurisdiction of the London Court of International Arbitration (“LCIA”) Tribunal appointed to determine the dispute.

[61] Habas contended that for the London arbitration clause to be incorporated into a contract there must be either an express reference to the clause or wording that showed a clear intention to incorporate it which was not present in that case; alternatively it was contended that even if general words sufficed the words used in that particular case were insufficient to achieve such incorporation. Sometal on the other hand maintained that the parties had in effect incorporated the London arbitration clause. The tribunal found in favour of Sometal and Habas appealed to the commercial court.

[62] Clarke J had to determine whether general words of incorporation are sufficient. He observed that the cases made a distinction between cases in which the parties incorporate the terms of a contract between two other parties or between one of them and a third party and those in which they incorporate standard terms.

[63] Clarke J then went on to identify four categories of incorporation of terms, which include an arbitration clause, into a contract namely:

- (i) A and B make a contract and incorporate standard terms;
- (ii) A and B make a contract incorporating terms previously agreed between A and B in another contract or contracts to which they were parties;
- (iii) A and B make a contract incorporating terms agreed between A and C or B and C; and
- (iv) A and B make a contract incorporating terms agreed between C and D.

- A [64] Clarke J concluded that a more restrictive approach applies to categories 3 and 4 when he stated (at paras. [49] and [52] of his judgment) as follows:

B There is a particular need to be clear that the parties intended to incorporate the arbitration clause when the incorporation relied on is the incorporation of the terms of a contract made between different parties, even if one of them is a party to the contract in the suit. In such a case it may not be evident that the parties intended not only to incorporate the substantive provisions of the other contract but also provisions as to the resolution of disputes between different parties, particularly if a degree of verbal manipulation is needed for the incorporated arbitration clause to work. These considerations do not, however, apply to a single contract case.

C ... the relevant distinction is between incorporation of the terms of a contract made between (a) the same and (b) different parties. In short there is a material distinction between categories 1 and 2 on the one hand and 3 and 4 on the other. In relation to the latter two categories a more restrictive approach to incorporation is required. That should not however mean that a similarly restrictive approach should apply to cases in categories 1 and 2.

D [65] The facts of the instant case fall within para. 3. It would appear that a restrictive approach should be adopted in determining whether the arbitration clause has been incorporated into the BG from the charterparty.

E [66] It is evident from a consideration of the case-law as a whole that the mere reference to 'Box 9' in itself is insufficient to incorporate the arbitration clause into the BG.

G [67] I have considered the arguments put forward by learned counsel for the defendant, namely Mr Gan Khong Aik in relation to the scope and compass of cl. 34 of the contract, which he submits, (as stated above) is wide enough to encompass the dispute in respect of the validity of the bank guarantee. The basis for this is that in determining the validity of the bank guarantee the court is bound to consider the provisions of the contract or charterparty in relation to the duration of the hire, which is inter-related to the validity of the bank guarantee as explained above. Mr Gan argues that this court should look at cl. 34 and in view of the words 'any dispute arising out of or in connection with this charterparty shall be referred to arbitration', the validity of the BG is inexorably interconnected with the charterparty agreement between the plaintiff and D2. This is because the BG was issued

pursuant to the charterparty agreement. Therefore any dispute relating to it is connected to and arises from the charterparty agreement. In this context learned counsel relies *inter alia* on *Standard Chartered Bank Malaysia Bhd v. City Properties Sdn Bhd & Anor* [2008] 1 CLJ 496 where Vincent Ng J held that a dispute relating to a retention bond issued in relation to a construction contract came within the purview of the arbitration clause in the construction contract.

[68] Having heard counsel at length and having questioned them, it appears to this court that the BG and the contract comprise two separate contractual documents. The BG is between the bank, D1 and D2 while the contract is between the plaintiff and D2. In determining whether the BG is the subject matter of arbitration, this court on the basis of the series of cases discussed above, has no hesitation in concluding that the BG is not the subject matter of the arbitration agreement as contained in the contract. The series of cases ranging from *TW Thomas & Co Limited v. Portsea Steamship Company Limited* [1912] AC 1 through to *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL* [2010] EWHC 29 (Comm); [2010] 1 All ER 1143 are authority for the proposition that in order to incorporate the effect of an arbitration clause in one agreement into another agreement, there must be very clear and specific words to that effect. In short the third party must be seen to have expressly agreed to arbitrate. A distinction is made between single party and two party contractors. A much stricter test is applicable for two party contracts as is the case here.

[69] It would appear from the various cases cited above that the principle of autonomy of the BG precludes the court from simply incorporating the arbitration clause into the BG simply because there is a reference to the same. It would require clear and specific words to make the bank a party to the arbitration clause which presently is only applicable between the plaintiff and D2. As for the case of *Standard Chartered Bank Malaysia Bhd v. City Properties Sdn Bhd & Anor* (above) it appears that in that case the parties had agreed to mutually submit to the jurisdiction of the arbitral tribunal in relation to the retention bond. Additionally the bank there had taken a neutral stance, unlike the present case where the bank maintains that the guarantee has expired.

A [70] Given these circumstances, I am satisfied that the BG is to be considered or construed separately from the contract. The issue of the validity does not, to my mind, amount to a dispute arising out of or in connection with the charterparty agreement. The BG is autonomous from the charterparty.

B [71] As I have concluded that cl. 34 of the contract is not wide enough to encompass the dispute in relation to the validity of the BG, it follows that this dispute relating to the validity of the BG need not be stayed pending the determination of the dispute between the plaintiff and D2 at arbitration. Accordingly the D2's application in encl. 6 seeking a stay of these proceedings pending arbitration is dismissed.

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D [72] This court is therefore seised with jurisdiction to determine the validity of the BG. In other words, the court can proceed to make a determination on the reliefs sought in this originating summons in encl. 1.

The Validity Of The BG – Has It Expired Or Not?

E [73] I therefore now proceed to determine the validity of the BG in order to determine whether it has expired or otherwise. The plaintiff seeks a declaration to the effect that the BG issued by the bank to D2 (at the behest of the plaintiff who was the bank's customer) has expired and that accordingly D2 is not entitled to call on the BG.

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G [74] The plaintiff has also prayed for injunctive relief to restrain the bank from making any payment of the sum guaranteed pursuant to the BG to D2, as well as an injunction to restrain D2 from calling upon the BG. At the hearing of this matter learned counsel for the plaintiff advised that it would not be proceeding with the injunctive relief sought in view of my decision in relation to encl. 6, as the injunctive relief was sought pursuant to the provisions of s. 11 of the Arbitration Act 2005. As I have concluded that the validity of the BG is a matter for this court to ascertain rather than the arbitral tribunal it follows that no injunctive relief pending arbitration can be sought.

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I [75] At the very outset, learned counsel for D2 raises the issue of the *locus* of the plaintiff to seek the relief it claims pursuant to s. 41 of the Specific Relief Act 1950 (in conjunction with O. 15 r. 16 of the Rules of Court 2012). D2 maintains that the issue of *locus* must first be determined by this court before it can embark on considering the substantive issue of the validity of the BG.

[76] Section 41 of Specific Relief Act 1950 provides as follows: A

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief: B

Provided that no court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration or title, omits to do so. C

[77] Order 15 r. 16 of the Rules of Court 2012 in turn provide as follows:

No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed. D

[78] D2 essentially maintains that the plaintiff has no *locus standi* to bring the current suit for determination by this court because the plaintiff is neither a party to the BG nor has any legal entitlement under the BG. The BG is between the bank and D2 and to that extent is autonomous. E

[79] The plaintiff is not privy to the BG and therefore lacks any 'legal character' or standing to bring the current suit. F

[80] In this context, D2 relies on the decision of the Federal Court in *YAB Dato' Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener)* [2009] 4 CLJ 253 where the term "legal character" in s. 41 of the Act was considered: G

In explaining the words "... legal character ..." as appearing in s. 41 of the Indian Contract and Specific Relief Act by *Pollock & Mulla* 10th edn, says at p 1065:

[81] Legal character or any right to any property are species of the same genus, *viz* 'legal status'. 'Legal character' however does not appear to be a phrase common to jurisprudence nor does it appear to be used in statutes except s. 42 of Specific Relief Act (s. 34 of the new Act) and s. 41 of the Indian Evidence Act. But what was intended to be meant was 'legal status'. A man's 'legal character' is the same thing as his status which is constituted by the attributes the law ascribes to him in his individual and personal capacity. H I

- A [82] After relying on a passage from *Sarkar's Specific Relief Act* 13th edn., the Federal Court went on to cite the judgment of Gopal Sri Ram JCA (as he then was) in the case of *The Attorney General of Hong Kong v. Zauiyah Wan Chik & Ors & Another Appeal* [1995] 3 CLJ 35 ('*Zauiyah Wan Chik's case*'):
- B [22] In *The Attorney General of Hong Kong v. Zauiyah Wan Chik & 3 Ors & Anor Appeal* [1995] 3 CLJ 35 Gopal Sri Ram JCA (as he then was) in commenting on the jurisdiction of the court to grant declaratory relief under s. 41 said at p. 49-50:
- C Now the jurisdiction of a Malaysian court to grant declaratory relief springs from two sources. First there is the statutory basis to be found in s. 41 of the Specific Relief Act 1950 which provides as follows:
- D ...
- The procedural adjunct to the statutory basis is to be found in O. 15 r. 16 of the Rules of the High Court 1980 which provides as follows:
- E ...
- The alternative basis for the grant of declaratory relief – a jurisdiction of great antiquity is the inherent jurisdiction of the court:
- F *Kuluwante (An infant) v. Government of Malaysia & Anor* [1978] 1 MLJ 92. It has long been recognised by Indian courts administering their Specific Relief Act 1877 (later revised and reenacted in 1964) that s. 42 of that enactment which is identical to s. 41 of our statute is not a complete code upon the subject
- G of declaratory decrees.
- H [83] In summary D2 submits that the jurisdiction of a court such as this to grant declaratory relief springs from s. 41 of the Act with a procedural adjunct to be found in O. 15 r. 16 of the Rules of Court 2012; and secondly the inherent jurisdiction of the court.
- I [84] D2 submits that the plaintiff, who seeks this declaratory relief bears the onus of proving that it possesses some 'legal character' or 'legal status' as defined above, under the BG. D2 further maintains that as the plaintiff is neither party to the BG nor has any legal entitlement under it, has not displayed the necessary 'legal character' or 'legal status' to warrant the grant of

the relief sought under either the Specific Relief Act 1950 or the inherent jurisdiction of the court. The BG being an independent document, based on the autonomy principle, it is submitted that the issue of the validity of the BG only concerns two parties namely the bank and D2 in relation to whether the bank should pay out on the guaranteed sum or whether D2 is entitled to demand on the guaranteed sum. Neither of these matters concerns the plaintiff, according to D2.

[85] The plaintiff in response relies on the cases of *Tan Sri Hj Othman Saat v. Mohamed Ismail* [1982] 1 LNS 2; [1982] 2 MLJ 177 (Federal Court) and *Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors & Other Cases* [1983] 2 CLJ 68; [1983] CLJ (Rep) 165; [1983] 2 MLJ 227 (Federal Court).

[86] In *Tan Sri Hj Othman Saat v. Mohamed Ismail* [1982] 1 LNS 2; [1982] 2 MLJ 177 (Federal Court), Abdoolcader J in delivering the judgment of the Federal Court held, *inter alia*, as follows:

The Question of the Respondent's Standing

It will be necessary at the outset to consider the scope of the power to grant declaratory orders and judgments. Chapter VI of the Specific Relief Act, 1950 deals with declaratory decrees and section 41 thereof provides for the discretion of the court as to declarations of status or right. Section 41 of the Specific Relief Act was textually adopted *totidem verbis* from section 42 of the Indian Specific Act 1877 (now section 34 of the Indian Specific Relief Act, 1963), and on an application of the law enunciated by the Privy Council and the Supreme Court of India in relation to the equivalent provisions in the Indian Specific Relief Act and Civil Procedure Code, section 41 of the Specific Relief Act gives statutory recognition to a well-recognised type of declaratory relief and subjects it to a limitation but it cannot be deemed to exhaust every kind of declaratory relief or to circumscribe the jurisdiction of the courts to give declarations of right in appropriate cases falling outside it. The court has power to grant such a decree independently of the requirements of the section, and such a declaration outside the purview of this statutory enactment will be governed by the general provisions of Order 15 Rule 16 of the Rules of the High Court 1980 which will then apply [*Supreme General Films Exchange Ltd. v. His Highness Maharaja Sir Brijnath Singhji Deo of Maihar & Ors.*, following *Vemareddi Ramaraghava Reddy & Ors v. Konduru Seshu Reddy & Ors.* Relying on the decisions of the Privy Council in *Fischer v. Secretary of State for India in Council* and *Partab Singh v. Bhabuti Singh*].

- A Although counsel for the respondent indicated in the court below that he is proceeding under section 41 of the Specific Relief Act, this statutory provision cannot apply as no entitlement of the respondent to any legal character or status or right to property or denial thereof is in issue, and he now accepts in answer to us
- B that the declarations are in fact sought under the provisions of Order 15 Rule 16 of the Rules of the High Court 1980 and not section 41 of the Specific Relief Act. In *Lim Cho Hock v. Speaker, Perak Legislative Assembly* [1979] 2 MLJ 85 it was held (at page 87) that a plaintiff in an action under Order 25 rule 5 of the Rules of the High Court 1957 (now Order 15 Rule 16 of the Rules of the High Court 1980) need only establish that his legal interests are peculiarly affected. Although it is not necessary for a plaintiff who seeks relief by way of declaratory judgment to show that he has a present cause of action,' he must be somebody with such an interest in the subject matter of the action as to justify his seeking relief [*Wilson, Walton International (Offshore Services) Ltd. v. Tees & Hartlepool Port Authority* [1969] 1 Lloyd's LR 120. A private individual may sue for a declaration if he has a cause of action at common law or to protect a statutory right, or if he suffers or will suffer special damage as a result of the defendant's action. In *Stockwell v. Southgate Corporation* [1936] 2 All ER 1343 Porter J said (at page 1351) that the test was whether the plaintiffs interests were peculiarly affected.
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- F On a general consideration of the authorities it would seem that the plaintiff in proceedings for a declaration need do no more than establish that he has a 'real interest' in the suit.

- G [87] In *Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors & Other Cases* [1983] 2 CLJ 68; [1983] CLJ (Rep) 165; [1983] 2 MLJ 227, Wan Suleiman FJ, delivering the judgment of the Federal Court stated as follows:

- H The first question raised was whether this claim for a declaration came within Order 25 Rule 5 (now Order 15 Rule 16). The plaintiffs, it is to be observed, were in a similar position to that of the plaintiff in the *Dyson Case*; they only asked for a declaration that they were under no obligation to the defendants. In other words, they had no cause of action in the traditional sense, that is, a cause of action upon which executor relief could be granted. The court, however, surveying the decisions on this point, decided by a majority that it had jurisdiction to grant a
- I declaration in these circumstances.

Pickford L.J. said, "I think ... that the effect of the rule (ie, Order 25 rule 5) is to give a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject matter of the declarations.

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[88] On the basis of these cases, the plaintiff submits in response that it is in fact 'peculiarly interested' in the BG as it is the plaintiff's funds in its customer's account which will be utilised to honour the BG. To that extent the plaintiff maintains that it has an interest in the declaration sought. The issue before the court is whether the plaintiff, who is not privy to the BG can demonstrate an interest sufficient to enable it to seek declaratory relief under s. 41 of the Specific Relief Act 1950 or O. 15 r. 16 of the Rules of the High Court 1980 or the inherent jurisdiction of the court as explained by Gopal Sri Ram JCA (as he then was) in *Zaayah Wan Chik*'s case.

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[89] It would indeed appear that the plaintiff has no clear 'legal character' or entitlement under s. 41 of the Specific Relief Act 1950 as it is not privy to the BG and enjoys no 'legal entitlement' under it which would warrant it initiating a claim on the BG. In other words, the plaintiff has direct cause of action against either the bank or D2 on the basis of the BG.

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[90] However it is evident from all the cases cited above that the Federal Court in the several decisions cited above recognises that s. 41 is not the sole repository or source of declaratory law. In both *Tan Sri Hj Othman Saat v. Mohamed Ismail* (above) and *Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors & Other Cases*, the Federal Court recognised that the court possessed a jurisdiction outside of s. 41 of the Specific Relief Act, which it held was as provided for in O. 15 r. 16 or its equivalent in the then Rules of the High Court 1980 which is mirrored by O. 15 r. 16 of the Rules of Court 2012 today. In *Zaayah Wan Chik*'s case, Gopal Sri Ram JCA sought to limit or constrain the jurisdiction conferred by O. 15 r. 16 by stipulating that these provisions merely provided a procedural adjunct to the statutory source defined by s. 41 of the Specific Relief Act 1950. Unfortunately the court did not, in that case proceed to deal with the earlier decisions of the Federal Court in *Tan Sri Hj Othman Saat* or *Hj Hussin Hj Ali* where these cases expressly referred to Privy Council, Indian and English cases which formed the premise for their conclusions that the right to declaratory relief could also

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A be sought under O. 15 r. 16. However in *Zaayah Wan Chik's* case, the Court of Appeal recognised the inherent power of the court to grant declaratory relief and also that s. 41 was not the sole repository or source for the grant of declarations.

B [91] In short, both lines of cases recognise that s. 41 of the Specific Relief Act 1950 is not exhaustive in relation to the grant of declarations. Whether it be under O. 15 r. 16 of the Rules of Court 2012 ('Rules of the High Court 1980') or the inherent jurisdiction of the court, this court is entitled to look outside of
C s. 41 of the Specific Relief Act in determining whether or not the plaintiff has *locus standi* to initiate this current originating summons in relation to the validity of the BG. The test, as I understand it, is whether the plaintiff has an interest in the subject matter of the dispute or whether the plaintiff's interests would be 'peculiarly affected' by the call on the BG.
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[92] It is clear that the plaintiff's interests would be directly affected by an honouring of the BG because it is the plaintiff's funds that would be utilised to honour the BG. If the BG has indeed expired the plaintiff would be out of pocket of that sum.
E In these circumstances I am satisfied that the plaintiff has a valid and legitimate interest in the dispute pertaining to the validity of the BG. More significantly I am also satisfied that the plaintiff's interests would be peculiarly affected by the honouring of the BG and to that extent the plaintiff has *locus standi* or standing to bring
F the current originating summons. The fact that the plaintiff has no direct cause of action in respect of the BG does not preclude the plaintiff from seeking the declaratory relief because its interests are peculiarly affected.

G **Alternative Remedy**

[93] D2 further submits that the plaintiff has alternative remedies other than the seeking of declaratory relief. It is submitted for D2 that should D1 pay out the guaranteed sum unlawfully, thereby
H affecting the financial deposits of the plaintiff with D1, then the plaintiff's recourse is to sue D1 for breach of the banker-customer fiduciary duty or breach of a contractual term of the contract between the plaintiff and D1. There is no place, it is contended, for the grant of a declaration in the form sought.

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[94] The fact that the plaintiff has the option of proceeding against the bank for wrongful honour of the BG does not to my mind, preclude the plaintiff from initiating this summons for declaratory relief. For the reasons I have set out above in relation to the plaintiff's standing or *locus* to initiate this summons I conclude that the existence of alternative remedies does not obviate or preclude the bringing of this summons.

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[95] It is pertinent that this issue of *locus* would not arise if the bank were to seek the declaration here rather than the plaintiff. However in such event, ie, if the bank were the plaintiff seeking the declarations sought, there would be nothing to preclude the current plaintiff, from intervening in such an application and being heard in the matter, as it possesses sufficient interest in doing so. In other words it would be allowed to intervene and be heard in a dispute relating to the validity of the BG in a dispute between the bank and D2.

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[96] In the instant case, the bank has categorically stated that the BG has expired and that it is therefore under no obligation to honour the same. It supports the plaintiff's stance. If I were to dismiss the plaintiff's claim on the sole ground of *locus standi*, the bank or D2 would initiate an action in relation to the validity of the BG in one form or another. The same issue would arise and the plaintiff here would be allowed to intervene to safeguard its interests. In the instant case the same dispute between the bank, D2 and the plaintiff also arises for adjudication. This affords a further reason to have the matter adjudicated upon at this juncture given the fact that under the law the court has jurisdiction to consider the plaintiff's claim for declaratory relief notwithstanding the lack of a legal cause of action. The plaintiff has demonstrated a clear interest in the matter in that its interests are peculiarly affected by the adjudication on the validity of the BG.

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[97] Finally D2 also contends that if the plaintiff has not come to court with clean hands in that it is guilty of 'inequitable' conduct. In support of this contention D2 relies on cl. 43 of the contract which requires the charterer to adjust the value of the BG and extend its validity to cover the intended extension period. This, D2 complains was an obligation on the part of the plaintiff which it never fulfilled. This, to my mind, is an issue which is outside the purview of the dispute before the court which is strictly related to the construction to be placed on the BG and not the contract or charterparty.

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- A [98] I therefore conclude that the plaintiff has *locus standi* or standing to seek the declaratory relief sought here.

The Merits – Has The BG Expired Or Not?

B *The Law In Relation To The Interpretation Of The BG By The Bank*

- C [99] Learned counsel for the plaintiff referred to the cases of *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* [1995] 1 CLJ 283; [1995] 1 MLJ 149 where the Supreme Court held “... it involves a straightforward exercise of construction, or interpretation, of the bond to discover the intention of the parties’ per Sir Denys Buckley in *IE Contractors Ltd v. Lloyds Bank Plc and Rafidain Bank* [1990] 2 Lloyd’s Rep 496 at p. 503; [1991] 51 BLR 1 at p. 15.

- D [100] Reliance was also placed on a recent decision of the Court of Appeal in *Master Marine AS v. Labroy Offshore Ltd* [2012] 3 SLR 125:

E 32 First and foremost, more often than not, an issuing bank knows nothing about the details of the transaction between the account party and the beneficiary. Hence, the bank cannot be expected to decide what exactly will (or will not) suffice. It may turn only to the wording of the performance bond for guidance. Secondly, the function that performance bonds are supposed to serve (*viz*, providing prompt payment to the beneficiary: see [26]

F above) can only be achieved if the banks are able to complete its assessment quickly, with little expense and little need to exercise its individual discretion. It is precisely this function that results in time always being of the essence in performance bonds. Thirdly, the speed at which decisions can be made is also relevant in the litigation context: the court, when assessing whether or not to

G grant an injunction to prevent payment under a performance bond, should be able to reach its decision quickly by referring only to the bond instrument. Fourthly, strict compliance is necessary to ensure certainty for both the account party and the beneficiary. The account party protects his interests by inserting in the

H performance bond all necessary requirements before monies can be paid out thereunder. The beneficiary in turn benefits from the certainty that he will be paid if he complies strictly with the terms of the performance bond.

- I 35 In our view, the first demand performance bond, in particular, is one such document where the court should be restrained in its examination of the external context and extrinsic evidence. First, like a standard form contract, “the presumption [is] that all the

terms of the agreement between the parties are contained in the contract”: see Zurich at [110]. As already mentioned at [26] above, the primary role of a performance bond in commerce is to ensure expediency in payment. At the time the call is made, both the beneficiary and bank need to be able to determine quickly if the demand is valid simply by looking at the bond instrument itself. There should not be a need for cross references to be made to the underlying contract to determine the ambit of the condition precedents, etc. Secondly, performance bonds are most commonly used in commercial contexts, particularly in the construction industry and in the area of international trade. Parties to these transactions are, more often than not, experienced commercial men who are able to appreciate that the underlying contract and the bond are independent contracts with different obligations *vis-à-vis* different parties. It would thus be reasonable to expect that parties ordinarily intend for each of these contracts to contain all the terms of the respective parties’ agreements.

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42 As a final word of caution: a contextual approach is certainly not a *carte blanche* for “creative interpretation” (as coined by Lord Lloyd in *Investors Compensation Scheme Ltd v. Wes Bromwich Building Society* [1998] 1 WLR 896 at 904D). As for as possible, the court should adhere to the plain meaning of the words, except for situations as described in [36] above. Because of the need for commercial certainty in this genre of instruments, the courts will hardly ever imply terms into them.

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[101] In summary it would appear from the foregoing that the salient guidelines to be adopted by a bank in determining or construing a performance bond or documents of like nature is as follows:

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(i) The bank does not, and is not expected to be cognisant of the details of the underlying transaction between the account party (ie, the plaintiff here) and the beneficiary (D2 here);

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(ii) As the function of a performance bond or bank guarantee is to provide prompt payment to the beneficiary, a bank should undertake to complete its assessment quickly, with little expense and little need to exercise its individual discretion;

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(iii) Time is of the essence;

(iv) Turning to the role of the court, it is important that the court itself be able to decide quickly by looking at the instrument; a decision should be made speedily;

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- A (v) Strict compliance is necessary to ensure certainty for both the account party and the beneficiary;
- (vi) As instruments such as performance bonds and bank guarantees are generally utilised by commercial men who understand that the underlying contract is separate and independent from the bank guarantee, these commercial men would have intended all the relevant terms to have been contained in the instrument; and
- B
- C (vii) Rarely are terms implied into these instruments or documents because of the need of commercial certainty.

Factual Matrix

- D [102] Clause 4 of the BG provides that the guarantee “shall remain in force until 14 calendar days after the expiry of the CPA mentioned in Box 9 of the CPA. If within this 14 days, we have not received any demand from you, this guarantee shall lapse and cease to have any effect whatsoever and we shall be deemed to be discharged and released from all and any liability under this guarantee without prejudice”.
- E
- [103] The period specified in Box 9 is specific – “Firm charter duration of 30 days (subject to on-hire certificate/from 23 October to 21 November 2012) with 30 days extension option”.
- F [104] Applying the principles of construction set out above, it follows that the BG lapses and ceases to have effect either:
- (a) With no extension – on 5 December 2012 because Box 9 provides that the duration of the charter is until 21 November 2012. A period of a further 14 days is accorded to enable D2 to make a demand bringing the date of expiry to 5 December 2012; alternatively
- G
- (b) With an extension of 30 days – on 4 January 2013 as with an extension of 30 days the charter would terminate on 30 December 2012. A further 14 days are afforded to enable the making of a demand under the BG bringing the date of expiry to 4 January 2013.
- H
- I [105] In this context it is pertinent that the bank has taken the first option, namely that the BG expired on 5 December 2012. The bank has taken this stance because no notice was given to

D2 of any extension to the BG under Box 9. As such the bank was not aware of any extension and therefore construing strictly the time period afforded in Box 9, the bank considers the BG to have expired on 5 December 2012. The bank is not privy to nor aware of the underlying contract or the decisions taken by the plaintiff and D2 in relation to the underlying contract or charterparty.

[106] D2 in response to this mode of determining the date of expiry of the BG maintains that it is incumbent upon this court to examine not only Box 9 but to proceed to consider the effects of cl. 49 (as produced above) and cl. 43 of the contract or charterparty. In other words D2 maintains that in order to give effect to the expiry date in the BG, this court must consider the effects of cl. 43 of the charterparty which provides that the BG is valid until one day upon expiry of the charter duration. In this context as explained at the outset in the factual matrix D2 maintains that vessel was only redelivered to the plaintiff on 7 March 2013 when D2 found considerable damage. D2 then relies on cl. 49 which provides that the daily charge shall only cease upon completion of the off-hire survey. As such a survey was not completed until a considerably later stage D2 maintains that the charter remains in place with charter hire payable well after 7 March 2013. As such it is submitted for D2 that the demand which was made on 21 March 2013 is within time.

[107] It is immediately apparent that D2's construction of the BG requires a consideration not only of the contents of the BG but also a consideration of the charterparty or contract, as well as extraneous matters pertaining to the factual matrix of the case. This would be contrary to the guidelines set out in *Master Marine AS v. Labroy Offshore Ltd* [2012] 3 SLR 125. It in fact appears to this court that if it were to give consideration to all the clauses in the charterparty as an aid to the construction or interpretation of the BG, it would effectively be usurping the function of the arbitrator and nullifying the effect of the arbitration clause. Any disputes relating to the interpretation of the various clauses arising in the charterparty or contract are to be determined by the arbitrator and not the court.

A [108] As I determined at the threshold stage that the BG has to be read as a separate and independent document and given the clear guidelines in *Master Marine AS v. Labroy Offshore Ltd* (above) it does not appear to be the correct approach to undertake a construction and interpretation of the underlying contract in addition to the BG.

C [109] Given the foregoing I concur with learned counsel for the plaintiff and the bank that the BG should be read *in vacuo* as it were. It therefore follows that the expiry date of the BG was either 5 December 2010 at the earliest or 4 January 2013 at the latest. As such the demand made on 21 March 2013 was well outside of the expiry of the BG, being either 105 or 75 days late.

D [110] By reason of the foregoing the plaintiff is entitled to the declaratory relief sought and I therefore grant the declarations sought by the plaintiff that:

- (a) The BG expired or had expired as of 21 March 2013, when D2 made a demand under it; and
- E (b) As the BG has expired either as of 5 December 2010 or 4 January 2013, D2 is not entitled to call on the BG.

F

G

H

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